No. 6038

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE BANKERS RESERVE LIFE COMPANY,
a corporation,

Appellant,

vs.

MARION E. YELLAND,

Appellee.

Petition for Rehearing

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PETITION FOR REHEARING

The appellee respectfully petitions the court for a rehearing in this cause for the following cogent reasons:

I.

The only question decided by the court and upon which the judgment of the District Court was reversed, is, "whether in the face of the written ap-

plication the testimony was competent to establish the obligation pleaded?" (Opinion page 2.) The obligation pleaded in the amended complaint was an *oral* contract of life insurance effective as soon as the assured had signed the application, paid the premium and passed the medical examination. (Tr. p. 5.) The court holds that such a contract may not be proved by *parol* evidence, because one of its terms tended to "vary or contradict" a clause in the printed application which the assured subsequently signed (without reading) at the request of the defendant's agent. Viewing the "obligation pleaded" in this light it at once becomes apparent that the decision of the court, holding that it could not be proved by parol evidence, is contrary to all authority. The court was no doubt led into error, when it assumed, contrary to the pleadings, the evidence and the special finding of the jury (Tr. pp. 49-50) that the printed application was "the contract." It is true as noted by the court that the appellee in giving her testimony, at one place, referred to the application as "the contract," but this alone does not justify the conclusion that the action was upon a written contract of insurance.

On page 4 of the Opinion it is said:

"Manifestly plaintiff must rely on the application as the basis of her claim, and indeed in her complaint

she repeatedly refers to it as 'the contract of insurance.' How then can she escape its plainly expressed terms and conditions? In her brief she argues that the alleged oral promises and representations made prior thereto were the inducing causes or considerations by which her husband was led to sign it and execute his promissory note. But if for that reason the application was void upon the ground that it was made through fraud or mistake, then she has no contract at all for no policy ever issued."

It is respectfully submitted the foregoing observations are not sustained by the record. The contract of insurance referred to in plaintiff's amended complaint was an oral contract of insurance (Tr. pp. 3-4) and by special verdict the jury found that Hickman was authorized to "make", and did make such a contract with Louis A. Yelland. (Tr. p. 49.) The application was not the contract. Indeed an application for insurance is never a contract, but merely an offer or proposal to purchase insurance.

"An application for insurance is simply a request, proposition or proposal for, or offer to accept, a contract or policy of insurance, and does not become a contract of insurance unless, and until, it is accepted by the company; the company is at liberty to accept or reject it, and, before acceptance, the applicant has the right to withdraw it."

32 C. J. 1102, Sec. 188.

It is well settled that parol contracts of present insurance are valid.

Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298.

Relief F. Ins. Co. v. Shaw, 94 U. S. 574, 24 L. Ed. 291.

Franklin F. Ins. Co. v. Colt, 20 Wall. 560, 22 L. Ed. 423.

Commercial Mut. Ins. Co. v. Union Mutual Ins. Co., 19 How. 318, 15 L. Ed. 636.

Such contracts of preliminary or temporary insurance are frequently made to protect the assured pending the company's action on his application and the issuance of the final contract or *policy* itself.

Franklin Fire Ins. Co. v. Colt, 20 Wall. 560, 22 L. Ed. 423, *supra.*

Koivisto v. Banker's, etc., Ins. Co., 181 N. W. (Minn.) 580.

Reynolds v. Northwestern Mutual L. Ins. Co., 176 N. W. (Ia.) 207.

Cottingham v. National Mut. Church Ins. Co., 124 N. E. (Ill.) 822.

Parol contracts of present insurance are of great importance, for if the applicant can not be made secure pending the issuance of the formal written contract or policy the beneficial effects of insurance would be greatly impaired.

"The object of the parties in making such a contract and of the courts in upholding the same is, that the parties may have the benefit of it during that incipient period when the papers are being perfected and transmitted."

Cottingham v. National Mut. Church Ins. Co., 124 N. E. (Ill.) 822, *supra.*

That it was the intention of the parties to enter into a parol contract of present insurance is plain from the record. Mr. Hickman the defendant's agent testified in part as follows:

"Mr. Yelland was reluctant to sign the application for insurance for he did not want to use his available cash to buy insurance, for he would need it before he sheared in the spring, but *signed the application on my suggestion that we could put his policy in force at once and give him the benefit of it by giving a note payable after the spring shearing.*" (Tr. p. 83.)

This corroborates the testimony of the plaintiff which is quoted by the Court at page 3 of the opinion:

"And, he (the deceased) said, 'well, the note—would the policy go into effect at the time you take my note'? and, he said, 'Yes, provided you pass Dr. Rand's examination satisfactorily.' And my husband said, 'Well, if it won't go into effect, I will wait until I can pay cash on the policy, then I will be sure of it,' and he says, 'There is no use taking it out until it goes into effect'. And he said, '*Well, it will go into effect right now, providing you pass Dr. Rand's examination. There is no question about it*'."

In *Kiovisto v. Banker's, etc., Ins. Co.*, 181 N. W. (Minn.) 580, *supra*, the basic facts were as follows: On October 2nd, 1918, the defendant's agent took plaintiff's application for the insurance of his property for three years from that date, received the premium, and *stated to plaintiff that the insurance*

then went into effect. The plaintiff believed and relied on the statement without reading or having the application explained to him. *The agent did not disclose to the plaintiff that there was a statement in the application that it was subject to the approval of the company's secretary or general agent.* The agent who took the application had apparent authority to make contracts of insurance in the company's behalf, of the character of contract he entered into. On October 12, 1918, *no policy having been issued,* the plaintiff's property was totally destroyed by fire. Judgment was entered in plaintiff's favor for the amount of the insurance agreed upon.

It will be noted that these facts are perfectly analogous to those in the case at bar. In affirming the judgment the court had no difficulty in finding that the contract made was a "parol contract of present insurance" and said (p. 582):

"We may not close our eyes to the fact that the local agent of an insurance company is the medium through whom the business of making insurance contracts is usually carried on. Such agents frequently make parol contracts for present insurance, and such contracts, if within the scope of the agent's authority are perfectly valid." (Citing cases.) * * * "It (the oral contract) served substantially the same purpose as a binding slip. If a policy was issued, it would, of course, supersede the preliminary contract. Until it was issued or the application was rejected, and the applicant notified, so that he would have an oppor-

tunity to get insurance elsewhere, we think it should be presumed, in view of its practice in dating policies that defendant intended that its agent should have power to provide for the protection of the applicant by a contract such as Matson (the agent) made with plaintiff."

To the same effect see:

Grennwich Ins. Co. v. Waterman, 54 Fed. 839 (C. C. A.) 5th.

Clark v. Banker's Acc. Ins. Co., 147 N. W. (Neb.) 1118.

Star v. Mutual L. Ins. Co., 83 Pac. (Wash.) 116.

The only contract made by the assured and Hickman being a parol contract for present or preliminary insurance, it, of course, can be proved only by parol evidence, and the application in question as hereinabove demonstrated being merely a "proposal" or "request" for a policy of insurance to be effective at a future date, the question of the admissibility of parol evidence varying or contradicting a writing is therefore not involved.

II.

But assuming, as the court did in the Opinion filed, that *the contract* was the printed *application* which the assured signed after he and Hickman had discussed and agreed upon the terms of a policy of insur-

ance, parol testimony was admissible, according to all the authorities, to show that the writing (*printed application, as prepared by the defendant's agent*) was not the contract which the parties intended to make. Under such circumstances the authorities, including the Supreme Court of the United States, hold that it is the duty of the insurance company's agent to prepare the application of the person solicited so that it will accurately and truthfully state the results of their negotiations, and if the agent fails to write into it the terms agreed upon, the company will be estopped to set up the application as a defense to an action on the policy. This principle was recognized and applied in *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall, 222, 20 L. Ed. 617, the leading case on the subject, and has been universally approved and applied in such cases by every modern authority.

In that case parol evidence was admitted to prove that answers to questions in the application prepared by the agent were not the answers which the applicant truthfully gave. It was there contended by the insurance company that such parol testimony was not admissible because it tended to contradict and vary the terms of the written contract sued upon, viz., the policy of insurance which included the application. Answering this contention Mr. Justice Miller, speaking for the full court, said:

"The great value of the rule of evidence here invoked cannot be easily over-estimated. As a means of protecting those who are honest, accurate and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability of misconstruction, the rule merits the eulogies it has received. *But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either;* and where this has been the result of accident or mistake or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the Statute of Frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; *and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.*" (Italics ours.)

And so in the case at bar. The clause in the printed application "That under no circumstances shall the insurance hereby applied for be in force until * * * delivery of the policy to the applicant in person, dur-

ing his lifetime * * *" represented neither the intention of the assured nor of Hickman. There was no evidence that the assured read the application before he signed it and for obvious reasons the presumption must be that he did not read it. Hickman testified:

"I don't remember whether Mr. Yelland read his application before he signed it." (Tr. p. 165.)

In this connection the language of Judge Morrow, in *McElroy v. British American Insurance Co.*, 94 Fed. 990, is peculiarly pertinent:

"The insured had a right to rely upon the agent performing his duty of making his contract in conformity with the information given, and the agent's failure so to do, whether the result of a mistake or a deliberate fraud, can not operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by good faith on both sides."

In *Kister v. Insurance Co.*, 128 Pa. St., 553 Atl. 447, which is quoted by Judge Morrow in the last cited case, the court said with respect to this particular point:

"We can not say that the law, in anticipation of a fraud on the part of the company, imposed any absolute duty upon Kister to read the policy when he received it, although it would have been an act of prudence to have done so. (Citing cases.) One thing is certain, however: The Company can not repudiate the fraud of the agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent

without examination. *Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application.*"

In *Pfister v. Missouri State L. Ins. Co.*, 116 Pac. (Kan.) 245, it was held that an applicant for insurance without knowledge to the contrary, may assume that the agent has prepared an application according to the prior oral agreement of the parties; that the company has written the policy according to the application; and that the assured is not negligent in failing to examine the application and policy for errors and omissions of the agent. After reviewing the authorities, the court said:

"Few persons solicitated to take policies understand the subject of insurance, or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract. They are clear upon two or three points which the agent promises to protect, and for everything else, they must sign ready-made applications and accept ready-made policies carefully concocted to conserve the interests of the company. The agent in fact prepares the contract when he writes the application, because the policy, which the applicant does not see until delivered, and does not sign, follows an acceptance of the application as a matter of course. In writing the application, the agent does what the company sent him out to do. He negotiates for the company, asks questions for the company, writes down answers for the company, and makes the return for the company. *It is not carelessness or imprudence in fact, as people in general understand those terms, for the applicant to take it for granted that the agent will accurately and truthfully set down the result of*

the negotiations. If he fail to do so, good sense and common justice regard the company as responsible, and not the insured. The subject, therefore, is *sui generis*, and the rules of a legal system devised to govern the formation of ordinary contracts between man and man cannot be mechanically applied to it." (Italics ours.)

If Hickman knowingly asked the assured to sign an application containing the aforesaid clause, after orally agreeing that the insurance would be effective "at once" he was guilty of "fraud"; on the other hand, if he intended to strike it out and forgot to do so, the instrument was the result of "accident" or "mistake." In either event, under the rule laid down by the Supreme Court, in *Union Mutual Ins. Co. v. Wilkinson, supra,* and according to every modern authority, oral testimony was admissible to prove the contract which the parties actually agreed to make and that the instrument signed was the result of "fraud," "accident" or "mistake." The oral testimony is not admitted to vary or contradict the printed application, but to show that the applicant's signature was procured thereto, under such circumstances by the defendant's agent as to estop the defendant from using it against the assured, or relying on its contents as a defense.

The theory on which the testimony is received, is set forth by Mr. Justice Miller in the *Wilkinson* case,

supra, and we again take the liberty of quoting therefrom:

"It is in precisely such cases as this that courts in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is, that where one party has by his representations or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. * * *

"The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet with our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

The doctrine of the *Wilkinson* case was again approved and applied by the Supreme Court in the later case of *American Life Insurance Company v. Mahone*, 88 U. S. 152, 22 L. Ed. 594, where Mr. Justice Strong, speaking for the entire court said:

"The testimony was admitted, not to contradict the written warranty, but to show that it was not the warranty of Dillard, though signed by him. Prepared, as it was by the Company's agent, and the answer to No. 5 having been made, as the witness

proved, by the agent, the proposals, both questions and answers, must be regarded as the act of the Company, which they cannot be permitted to set up as a warranty by the assured. And this is especially so when, as in this case, true answers were in fact made by the applicant (if the witness is to be believed), and the agent substituted for them others, now alleged to be untrue, thus misrepresenting the applicant as well as deceiving his own principals. Nor do we think it makes any difference that the answers as written by the agent were subsequently read to Dillard and signed by him. Having himself answered truly, and Yeiser having undertaken to prepare and forward the proposals, Dillard had a right to assume that the answers he did make were accepted as meaning, for the purpose of obtaining a policy, what Yeiser stated them in writing to be."

While the facts in the case at bar differ slightly from those of the *Wilkinson* and *Mahone* cases, in principle they can not be distinguished. Insofar as the parol evidence rule is concerned, the cases are identical. In the decided cases the alleged answers of the applicant to the question contained in the application were pleaded by the Insurance Company as covenants in the contract, and were so recognized by the Court. In the case at bar, the covenant relied on as a defense, is one which was printed in the application by the company.

The Opinion filed does not distinguish the *Wilkinson* case, but on page 6, it is said that:

"The decision must be deemed to have been restricted to a narrower range by later decisions," citing

Insurance Company v. Lyman, 82 U. S. 664; *N. Y. Ins. Co. v. Fletcher*, 117 U. S. 519; *Assurance Co. v. Building Association*, 183 U. S. 308.

The facts of the *Lyman* case are plainly without analogy. There the policy had been delivered to the assured, and for that reason the court held that all previous negotiations and verbal statements were merged when the parties assented to the written policy. It further appeared in that case *that the loss of the insured vessel had occurred before the execution and delivery of the policy, but the insured had concealed that fact from the company.* By its terms, the policy was effective after the date of the loss, and to overcome this, the insured sought to prove a parol agreement to renew a previous policy of insurance covering the period between the expiration of that policy and the issuance of the new one, contrary to the express terms of both the application and the policy. Under these circumstances, the parol evidence was excluded, the court saying:

"And it is hardly necessary to say, that the party who has destroyed the validity of that contract by his own fraud, cannot for that reason treat it as if it had never been made, and recover on the verbal statement made before its execution."

The *Wilkinson* case was neither cited to the court by counsel, nor was it mentioned by the court. It can hardly be said therefore that the *Lyman* decision "re-

stricted to a narrower range" the rule of the *Wilkinson* case.

In *New York Life Insurance Co. v. Fletcher*, 117 U. S. 519, it was held that a stipulation in the application and policy to the effect that no statements or representations made or information given to persons soliciting or taking the application shall be binding on the company, or in any manner affect its rights, unless reduced to writing and presented at the home office in the application, was effectual to prevent a waiver, even though the question in the application was correctly answered by the insured, but incorrectly recorded in the application by the company's agent. The court there said:

"If he (applicant) had read even the printed lines of his application, he would have seen that it stipulated that the rights of the Company could in no respect be effected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. *The Company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation.* * * *"

"The present case is very different from *Insurance Co. v. Wilkinson*, 13 Wall. 222, and from *Insurance Co. v. Mahone*, 21 Wall. 152. *In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured.*" (Italics ours.)

In the case at bar, there was no limitation in the application upon the power of the agent, and the

court, in the Opinion, assumes that Hickman had unlimited powers to contract on behalf of the defendant. (This was fully determined by the special findings of the jury. Tr. pp. 49-50.)

In *Northern Ins. Co. v. Grandview Building Asso.*, 183 U. S. 308, the court held that the agent's knowledge of the existence of other insurance did not operate as a waiver of a condition in the policy rendering it void in case of other insurance, where the policy provided: that no agent shall have power to waive any provision of the policy except such as by the terms of the policy, may be the subject of agreement indorsed thereon or added thereto; and that, as to such provisions or conditions, no agent should have power, or be deemed to have waived such provisions or conditions, unless such waiver be written or attached to the policy; and further, that no privilege or promise effecting the insurance shall exist, or be claimed by the insured, unless so written or attached. The policy having been delivered to the assured, *he had actual notice of the limitations upon the power of the agent to make parol waivers*, and on this ground the case is distinguished from both the *Wilkinson* case and the case at bar. In this respect, it is similar to the *Fletcher* case. Indeed, in the course of the Opinion, Mr. Justice Shiras quotes at length from the

Fletcher case, and emphasizes the following therefrom:

"The present case is very different from Union Mutual L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, and from American Insurance Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593. *In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured.*" (Italics by the Court.)

From the foregoing analysis of the cases deemed by this court to be controlling, it is manifest that the doctrine of the *Wilkinson* case has not "been restricted to a narrower range by later decisions," but in each instance, the court has itself clearly distinguished each case, and held that the doctrine of estoppel *in pais* was not applicable for the reason that knowledge of the limitation upon the power of the agent to contract or waive forfeitures was brought home to the assured either in the application or in the policy itself, or both.

In the case at bar, there is nothing in the application limiting the powers of the agent, there is no evidence in the record that the assured had notice of any such limitation, and the jury, by its special verdict, has conclusively found that the agent had unlimited powers to make contracts of insurance. For these reasons, this case is not controlled by *New York Insurance Co. v. Fletcher* and *Assurance Company v.*

Building Association, on the authority of which the judgment was reversed, but falls squarely within the rule of the *Wilkinson* case.

In its decision the court says, on page 4:

"Nor are we able to see of what avail to plaintiff the doctrine of equitable estoppel can be. In the first place, the *transaction would seem to be wanting in the essential elements of estoppel.* By the testimony it is shown that Yelland was disinclined to apply for insurance until he could conveniently spare the money for the first premium, and hence had it not been for Hickman's alleged representations he would have deferred making application, and consequently would have been without insurance at the time of his death. True, because of such representations he executed the note, but that was promptly tendered back by the defendant. How, then, can it be said that he acted upon the representations to the prejudice of himself or the plaintiff?" (Italics ours.)

The essential elements of estoppel *in pais* are concisely stated in 21 C. J. 1119, as follows:

"*Essential Elements—a. In General.* In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice. To constitute an 'estoppel in pais' there must concur an admission, statement, or act inconsistent with the claim afterward asserted, action by the other party thereon and injury to such other party."

And in *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618, the Supreme Court defines estoppel *in pais* as follows:

"The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. *The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.* Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit." (Italics ours.)

On the faith of the oral agreement made with Hickman, Yelland gave his promissory note in the sum of $237.60 bearing interest *from date* at the rate of eight per cent. (Tr. 31.) Upon his death, the defendant had a legal right to enforce payment of the note against Yelland's estate. It will not do to say that after his death the defendant tendered back the note. If an insurance company can avoid its obligations under a contract of insurance after a loss occurs, by tendering back the amount of the premium, a binding contract of insurance could never be made. And while it is true that Yelland was at first "disinclined" to apply for insurance because he could not conveniently spare the cash, yet he was persuaded

irrevocably to obligate himself and his estate upon a promissory note, which, according to the testimony of the banker, residing in his community, was as good as gold. (Tr. 118-119.) It may be that if Hickman had not solicited Yelland, an agent of some other insurance company might have done so, giving him the insurance protection which he thought he had when he signed the application and gave Hickman his note. Moreover, it is a matter of common knowledge that most people are "disinclined" to purchase insurance when first solicited, and must be persuaded to do so by high-powered salesmanship, such as Hickman possessed and exercised on Yelland. If the doctrine of estoppel *in pais* becomes unavailable to an assured because he was *solicited* to enter into a contract of insurance, it could never be applied in these cases. The rule which this court now lays down if followed to its logical conclusion would prohibit even executive officers of insurance companies from making parol contracts and parol waivers of provisions in written contracts. Indeed, if this court's interpretation of the doctrine of equitable estoppel were correct, it would have been unavailable to the plaintiffs in the *Wilkinson* and *Mahone* cases, for while it does not expressly appear from the Opinions in those cases, the inference is plain that the assured in each instance dealt with an agent who *solicited* him.

Paraphrasing the language of the Supreme Court in *Dickerson v. Colgrove*, *supra*, the vital principle on this point is that Hickman, by his language and conduct, caused Yelland to do what he would not otherwise have done (namely, to enter into a contract of insurance and obligate himself and estate on a promissory note bearing interest from date), and the defendant is now seeking, by means of the written application, to cause his widow "loss or injury by disappointing the expectations upon which he (Yelland) acted."

In conclusion, it is respectfully urged that the decision of this court is not only fundamentally erroneous in the respects above pointed out, but the decision followed to its logical conclusion closes the door to the application of the doctrine of equitable estoppel, even in cases identically similar to the *Wilkinson* and *Mahone* cases.

WHEREFORE the appellee prays this Honorable Court that a rehearing may be granted in order that the doctrine laid down in the Opinion herein may be re-examined in the light of the foregoing considerations, and thereupon that the decision of this court, entered on the 9th day of June, 1930, be set aside and a mandate returned to the District Court directing the affirmance of its judgment.

MOTION FOR STAY OF MANDATE

In the event that this Petition for Rehearing is denied, the appellee respectfully moves the court for a stay of mandate, sufficient in length of time to permit her to apply to the Supreme Court of the United States for a Writ of Certiorari, to the end that this cause may be reviewed and determined by said Court.

Respectfully submitted,

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Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing Petition for Rehearing, and that in my opinion the Petition is well founded, and that the Petition is presented in good faith and not for delay.

GEORGE F. VANDERVEER,

Counsel for Appellee.